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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE ONCOLOGY CORPORATION, Plaintiff and Respondent, v. SERIES 1 OF MTI PROPERTIES, LLC, Defendant and Appellant.	A128351 (Alameda County Super. Ct. No. HG07305696)
THE ONCOLOGY CORPORATION, Plaintiff and Appellant, v. SERIES 1 OF MTI PROPERTIES, LLC, Defendant and Respondent.	A129773
SERIES 1 OF MTI PROPERTIES, LLC, Cross-complainant and Appellant, v. CHENG, CHOW & CHU, INC., Cross-defendant and Respondent.	A130132, A132061

INTRODUCTION

The issues we confront in these consolidated appeals arise from a real property dispute between two adjacent commercial property owners over the location of an easement affording parking rights to one of the owners. Plaintiff, respondent and

appellant The Oncology Corporation (Oncology), is the owner of the dominant tenement, a commercial property (Oncology property or Property) located in downtown Hayward. Defendants Series 1 of MTI Properties, LLC (MTI) and Cheng, Chow & Chu, Inc. (Cheng) are the current and former owners, respectively, of the servient tenement, a commercial property known as the Hayward Professional Center (HPC property), which is adjacent to and abuts the Oncology property.

In 2007, Oncology filed a complaint against MTI and Cheng, seeking to quiet title to access and parking easements on the HPC parking lot as well as injunctive relief. MTI filed a cross-complaint against Cheng seeking, among other things, indemnity and contribution. These consolidated appeals follow entry of judgment after the claims raised in the complaint and cross-complaint were bifurcated and tried before the court in separate proceedings designated Phase I and Phase II.

In A128351, MTI appeals the trial court's entry of judgment, at the conclusion of Phase I of the trial proceedings, granting Oncology's request for injunctive relief (ordering removal of barriers installed on the HPC lot) and the court's ruling regarding the location of six parking spaces reserved for Oncology under an express easement when it purchased the Property in 1985. MTI also appeals the trial court's award of attorney fees to Oncology as prevailing party. In A129773, Oncology cross-appeals the trial court's Phase I ruling denying its claim that it acquired a prescriptive easement to 30 parking spaces on the HPC lot.

The two remaining appeals relate to the trial court's judgment after Phase II of the trial proceedings on MTI's cross-complaint against Cheng. In A130132, MTI appeals the trial court's judgment that MTI take nothing by its cross-appeal and declaring Cheng the prevailing party on the cross-complaint. In A132061, MTI appeals the trial court's post-judgment order awarding Cheng attorney fees for Phase II proceedings.

We have thoroughly reviewed the record and carefully considered the contentions raised by the parties in these consolidated appeals. Having done so, we affirm the trial court's judgments in all respects.

FACTUAL AND PROCEDURAL BACKGROUND

The Oncology property and the HPC property formerly comprised one large parcel owned by the Vesper Society (Vesper). In the mid-80's, Vesper sold a portion of its commercial property, comprising a hospital building and a large parking lot, to Republic Health Corporation of San Leandro (Republic Health). Shortly thereafter, Vesper sold the remainder of its commercial lot to Oncology (Oncology property). The Oncology property is located at 1028-1034 A Street in Hayward. The commercial property purchased by Republic Health became known as the Hayward Professional Center (HPC) when Republic Health sold the property to Cheng.

Oncology operates a cancer radiation treatment center at the A street site. The HPC property, situated adjacent to and north of the Oncology property, is located at 22336 Main Street and 2245 Maple Court in Hayward. Entry to the HPC property is off Main Street, which runs in a north-south direction and bounds the HPC property to the west. Vehicles access the Oncology property by turning off A Street, which runs in an east-west direction and bounds the Oncology property to the south, into a driveway running parallel to the Oncology building. On each side of the driveway are angled parking spaces. The parking spaces on the right (east) of the driveway abut the Oncology building. When leaving the Oncology property vehicles can exit through the HPC parking lot onto Main Street.[1]

As indicated above, the Oncology property and the HPC property comprised a single parcel of real property owned by the Vesper. In July 1982, Vesper leased the Oncology property for a period of five years to Dr. John Fuery, the sole shareholder and owner of Oncology. The lease included an option to purchase the property, which, if exercised, granted Fluery an exclusive easement over "such property of the Landlord for the purposes of providing six paved parking spaces immediately adjacent to the front or

[1] For the benefit of the reader, the orientation of the properties is shown on diagram 1 attached to this opinion, which is a modification of the color photograph included as Exhibit 1 in the appendix to Respondent's and Cross-Appellant's Opening Brief.

back entrance to the demised premises which will be exclusively reserved for radiation oncology car service, ambulances and patients." Further, the lease required Dr. Fuery to construct a concrete addition at the rear of the building to house an additional treatment room and also allowed him to construct, at his own expense, a second addition at the rear of the building housing up to two more treatment rooms.

In March 1984, Vesper sold the HPC property to Republic Health and in December 1985 sold the Property to Oncology. Before purchasing the Property, however, Dr. Fuery requested an easement for ingress and egress (access easement) to serve as an area for loading and unloading ambulances and also provide a turn around area should egress through the HPC lot ever become unavailable. To this end, Republic Health executed a grant of easement in favor of Vesper, which was recorded on December 20, 1985. Under the grant of easement, Republic Health, owner of the servient tenement (HPC property) granted Vesper, owner of the dominant tenement (the Property), two easements to "remain in full force and effect so long as the Dominant Tenement is not used for purposes in competition with the hospital located on the Servient Tenement . . . . [¶] . . . [¶] The first easement granted herein is for ingress and egress and is located as described [by metes and bounds] in Exhibit A attached hereto. [¶] The second easement granted herein is for the use of six (6) undesignated parking spaces adjacent to the property line between the Dominant Tenement and the Servient Tenement." The grant of easement also provides that "[t]his instrument shall bind and inure to the benefit of the respective heirs, personal representatives, successors, and assigns of the parties thereof."[2]

Republic Health operated a hospital at the site until the hospital was decommissioned. After decommission, the commercial property upon which the hospital and adjoining parking lot were located became known as the Hayward Professional

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[2] The access easement is a rectangular area adjacent to northwest corner of Property, as shown on diagram 2 attached to this opinion, which is a modification of Exhibit 77, included in the appendix to Respondent's and Cross-Appellant's Opening Brief.

Center (HPC). Cheng purchased the HPC property in 1992. A dispute arose in 2001 (2001 dispute) concerning perceived misuse of the HPC parking lot by Oncology and its tenant. In January 2002, Cheng installed certain metal posts that created a barrier preventing access between the HPC parking lot and the Property.[3] MTI purchased the HPC property from Cheng in February 2005.

In January 2007, Oncology filed a complaint against Cheng and MTI seeking quiet title and injunctive relief. Specifically, Oncology sought to quiet title to the express easements created by the 1985 grant of easement (First Cause of Action) and also sought a determination that it had acquired a prescriptive easement consisting of the right to travel through the HPC lot to the exit on Main Street and the right to exclusive use of 30 parking spaces on the HPC lot (Second Cause of Action). In addition, Oncology sought injunctive relief ordering the removal of steel posts obstructing access from the Property to the HPC parking (Third Cause of Action). In response to Oncology's complaint, MTI filed a cross-complaint against Cheng alleging breach of contract, intentional and negligent misrepresentation, suppression of fact, indemnity and contribution based on Cheng's failure to disclose Oncology's prescriptive easement claim when MTI purchased the HPC property.

As noted above, the trial court bifurcated trial of issues raised by the pleadings. Phase I of the trial proceedings commenced in May 2009 and addressed Oncology's claims (excluding its claim for damages) against defendants Cheng and MTI. During Phase I the court received documentary evidence and heard testimony from Dr. John Fuery, owner of Oncology, Stephen Kass, Dr. Fuery's former attorney who acted for Oncology during the 2001 dispute, Clifford Cheng, of Cheng, Chow and Chu, and Michael Nakamora, owner of MTI, among others.[4] During Phase I of the trial, Oncology and Cheng reached an agreement whereby Cheng disclaimed any interest adverse to

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[3] The area bounded by the posts is illustrated on diagram 2 and includes the access easement.

[4] The evidence adduced at trial in Phases I and II is described below where relevant to our resolution of the issues presented on appeal.

Oncology's claimed easements and Oncology dismissed the complaint, with prejudice, as to Cheng only.

The court's Statement of Decision (SOD) on Phase I was filed in December 2009. In regard to the first cause of action alleged in Oncology's complaint, the court concluded that the 1985 easement granting use of six undesignated parking spaces was separate from and not within the access easement also granted in that instrument. Specifically, the court ruled that the parking spaces granted in the parking easement are "six of the seven marked parking spaces that are located along the property line along the rear wall of Plaintiff's building" (as shown on diagram 1 attached to this opinion). The court granted Oncology's request for injunctive relief, as asserted in its third cause of action, enjoining MTI from obstructing Oncology's use of the parking easement and ordering that existing barriers be removed. However, the court rejected Oncology's claim of a prescriptive easement over 30 parking spaces in the HPC lot, as alleged in its second cause of action, concluding that Oncology failed to show open, continuous and notorious use of the HPC property by clear and convincing evidence. Last, the court determined Oncology was the prevailing party, within the meaning of Civil Code, section 1717 (section 1717) and Code of Civil Procedure, section 1032 (section 1032) because it prevailed on the First and Third Causes of Action alleged in the complaint.

In December 2009, the court filed an order denying MTI's motion for attorney fees. Judgment quieting title and for injunctive relief was filed on February 23, 2010. MTI filed a timely Notice of Appeal from the judgment on April 23, 2010. Oncology filed a Notice of Cross-Appeal on May 10, 2010. On July 13, 2010, the trial court filed an order awarding Oncology attorney fees at the rate of 35 percent of the fees requested ($263,698 x 0.35), namely, $92,294.30. MTI filed a notice of appeal against the court's post-judgment, attorney-fee order on September 3, 2010.

Phase II of the trial proceedings, addressing MTI's cross-complaint seeking indemnity and contribution against Cheng, took place on February 23, 2010. MTI rested after presenting testimony from Michael Nakamura, owner of MTI, and Hisatomo Fukumoto, controller for MTI and other companies owned by Nakamura. Cheng

presented testimony from Clifford Cheng and John Crockett, the real estate agent who acted on behalf of Cheng in the sale of the HPC property to MTI. The court filed a SOD on Phase II in September 2010, in which it adopted and incorporated by reference all relevant findings of the Phase I SOD. The court found that Cheng had no actual knowledge of a claim by Oncology to an alleged prescriptive easement. The court also found Cheng did not intentionally or negligently misrepresent, or suppress, the alleged prescriptive easement on the HPC property. Judgment on Phase II was filed on September 24, 2010, ordering that MTI take nothing by the cross-complaint and decreeing Cheng the prevailing party on the cross-complaint. MTI filed a notice of appeal against the judgment on Phase II on October 26, 2010. On May 10, 2011, the court filed an order awarding Cheng the amount of $46,400.23 in attorneys fees as the prevailing party on MTI's cross-complaint. MTI filed a notice of appeal against the trial court's attorney fee order on May 20, 2011.

DISCUSSION

A. Location of Parking Easement (Phase I)

In A128351, MTI challenges the trial court's ruling in Phase I of the bench trial proceedings that the six-space parking easement granted under the 1985 instrument is located along the rear (north side) of the Oncology building. We affirm the trial court's ruling on this point.

California law provides an easement may be created by express grant. (*Wolford v. Thomas* (1987) 190 Cal.App.3d 347, 354; see also 12 Witkin, Summary of Cal. Law (10th ed. 2005) Real Property, § 382, p. 446.) Where, as in this case, an easement arises from an express grant, the use of the easement is determined by the terms of the instrument creating it. (Civ. Code, § 806; see also *Norris v. State of California ex rel. Dept. Pub. Wks.* (1968) 261 Cal.App.2d 41, 45.) "In construing an instrument conveying an easement, the rules applicable to the construction of deeds generally apply. If the language is clear and explicit in the conveyance, there is no occasion for the use of parol evidence to show the nature and extent of the rights acquired. [Citations.] If the language is ambiguous, extrinsic evidence may be used as an aid to interpretation unless such

evidence imparts a meaning to which the instrument creating the easement is not reasonably susceptible. [Citation.]" (*Scruby v. Vintage Grapevine, Inc.* (1995) 37 Cal.App.4th 697, 702 [also noting that if scope of easement grant is ambiguous or uncertain, court may consider "the surrounding circumstances, including the physical conditions and character of the servient tenement and the requirements of the grantee," *id.* at p. 705].) Where the trial court bases its interpretation of an instrument on conflicting extrinsic evidence, "a reasonable construction of the agreement by the trial court which is supported by substantial evidence will be upheld" on appeal. (*In re Marriage of Fonstein* (1976) 17 Cal.3d 738, 746-747 (*Fonstein*); *Morey v. Vannucci* (1998) 64 Cal.App.4th 904, 912-913.)

Here, the 1985 grant of easement describes the parking easement as follows: "The second easement granted herein is for the use of six (6) undesignated parking spaces *adjacent to* the property line between the Dominant Tenement and the Servient Tenement." Unlike the access easement granted under the same instrument, the location of the six undesignated parking spaces is not defined by metes and bounds; rather, the express language of the parking easement states that the six parking spaces are "adjacent" to the property line (see Oxford English Dictionary, Third edition, January 2012; online version March 2012 ["adjacent" means "next to or very near"; "neighboring; "bordering"; "contiguous" with; "adjoining"]), but fails to identify where along the property line the spaces are located. Accordingly, the language of the grant is ambiguous and the trial court was permitted to consider parole evidence in determining the location of the parking easement. (See *Appleton v. Waessil* (1994) 27 Cal.App.4th 551, 554-555 ["the trial court's threshold determination of ambiguity is a question of law [Citations] and is thus subject to our independent review"].)

At trial the parties presented conflicting evidence regarding the location of the six parking spaces referenced in the 1985 easement. Oncology's owner, Dr. John Fuery testified that during the term of Oncology's lease with Vesper six parking spaces at the rear (north) of the Oncology building were reserved for Oncology's use. When Oncology purchased the property from Vesper there was no discussion about moving the dedicated

parking spaces to another location. In contrast to Fuery's testimony, Gordon Glenn, a licensed land surveyor, testified on behalf of MTI that the parking spaces are located adjacent to property lines on the west side of the Oncology building where the access easement is located. Glenn relied on a 1986 site plan for a proposed hospital addition, which Glenn obtained from the files of the Hayward Planning Department to support his opinion. The 1986 site plan depicts four parking spaces within the access easement area "to be dedicated for the use of the adjacent property owner." Glenn also testified that all six spaces could fit within the access easement area.

We conclude, given this conflicting evidence, that the trial court's finding in favor of Oncology regarding the location of the parking space easement is reasonable. In interpreting the parking easement as "six of the seven marked parking spaces that are located along the property line along the rear [north] wall of Plaintiff's building," the trial court was faithful to the express language of the easement grant "for the use of six (6) undesignated parking spaces *adjacent to the property line*." (Italics added.) As importantly, in determining that the parking easement was outside of and separate from the access easement, the court's construction is consistent with the language of the grant, which clearly prescribes two separate easements, one for access and one for parking.

Moreover, the trial court's resolution of the conflicting extrinsic evidence on this point is supported by substantial evidence. As noted above, Dr. Fuery testified that the six designated parking spaces under his lease with Vesper were at the rear [north] of the Property and there was no discussion about moving the dedicated parking spaces to another location under the easement Vesper obtained from Republic Health to facilitate the sale of the Property to Oncology. After Oncology purchased the Property, it continued to use parking spaces located at the rear of the Property as it had under the lease with Vesper. Also, the court received into evidence a photograph showing the rear of the Oncology building, circa 1985. The photograph shows the treatment room Dr. Fuery added to the north east of the building under the terms of the Vesper lease. A row of cars can be seen parked at the rear [north] of the new treatment room and extending beyond it. The cars depicted in the photo are parked along the northern

boundary of Oncology's property line—in the location of the parking easement determined by the trial court.

We reject MTI's contention that the trial court's determination that the parking easement is located at the rear of the Oncology building, separated from the access easement, is inconsistent with the intent of the grantor of the easement. As noted above, the instrument granted two separate and distinct easements, one for parking and one providing a loading area and turn around area in the event egress through the HPC lot was terminated. Nothing in the language of the express easement supports MTI's attempt to read into the instrument such a limitation. Moreover, two principles of the law of easements support our rejection of MTI's assertion. First, the grant of an easement "is to be interpreted liberally in favor of the grantee." (Civ. Code, § 1069; *Norris v. State of California ex rel. Dept. Pub. Wks., supra,* 261 Cal.App.2d at pp. 46-47.) Second, and more importantly, where an easement is based on a express grant, the grant passes to the easement holder not only "those interests expressed in the grant" but also "those necessarily incident thereto." (*Pasadena v. California-Michigan Etc. Co.* (1941) 17 Cal.2d 576, 579.) Here, access across HPC property is "necessarily incident" to Oncology's enjoyment of the six parking spaces granted under the parking easement. (*Id.;* see also *North Fork Water Co. v. Edwards* (1898) 121 Cal. 662, 665-666 ["Every easement includes what are termed 'secondary easements'; that is, the right to do such things as are [reasonably] necessary for the full enjoyment of the easement itself"].)

In sum, because the trial court's construction of the grant of easement in favor of Oncology, based on conflicting extrinsic evidence, was reasonable and supported by substantial evidence, we must uphold it on appeal. (See *Fonstein, supra,* 17 Cal.3d at pp. 746-747.)

B. Prevailing Party Status (Phase I)

In A128351, MTI further contends the trial court erred when it determined that Oncology was the prevailing party on Phase I of the trial proceedings and awarded

attorney fees under sections 1717 and 1032.[5] "A trial court has wide discretion in determining which party is the prevailing party under section 1717, and we will not disturb the trial court's determination absent 'a manifest abuse of discretion, a prejudicial error of law, or necessary findings not supported by substantial evidence.' " (*Silver Creek, LLC v. Blackrock Realty Advisors, Inc.* (2009) 173 Cal.App.4th 1533, 1539.) Here, MTI contends the trial court narrowly construed the attorney fee provision in the 1985 grant of easement to exclude an award of attorney fees to MTI as the prevailing party on Oncology's prescriptive easement claim. This contention is unavailing.

In general, attorney fees under section 1717 are available to the prevailing party only on claims under the contract, not on tort claims. (See *Gil v. Mansano* (2004) 121 Cal.App.4th 739, 742-743 [" 'Civil Code section 1717 does not apply to tort claims; it determines which party, if any, is entitled to attorney[ ] fees *on a contract claim only*.' " [italics added].) " 'This distinction between contract and tort claims flows from the fact that a tort claim is not 'on a contract' and is therefore outside the ambit of section 1717.' [Citation.]" (*Id.* at p. 743.) Nevertheless, the parties may avoid the general rule if they agree to "a broadly phrased contractual attorney fee provision" that provides the prevailing party will be awarded attorney fees incurred in any litigation between themselves, whether such litigation sounds in tort or in contract. (*Ibid.*; accord, *Silver v. Boatwright Home Inspection, Inc.* (2002) 97 Cal.App.4th 443, 449 [noting "parties to a contract may agree that in the event of litigation between themselves, the prevailing party

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[5] As the trial court acknowledged, attorney fees in this case are available under both sections. Section 1717 provides in pertinent part: "The court . . . shall determine who is the *party prevailing on the contract* for purposes of this section. . . . [T]he party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract." (§ 1717, subd. (b)(1) [italics added].) Section 1032 provides in pertinent part: "When any party recovers other than monetary relief . . . the 'prevailing party' shall be as determined by the court, and under those circumstances, the court, in its discretion, may allow costs or not and, if allowed may apportion costs. . . ." (§ 1032, subd. (a)(4).) In turn, Code of Civil Procedure, section 1033.5 states: "The following items are allowable as costs under Section 1032: [¶] . . . [¶] (10) Attorney's fees, *when authorized by* any of the following: (A) *Contract*." (*Id.* [italics added].)

will be awarded attorney's fees whether the litigation concerns contract or noncontract claims, or both"].)

To determine whether a contractual fee agreement provides for attorney fees in a tort action, the ordinary rules of contract interpretation apply, under which we infer the mutual intent of the parties from the plain meaning of the contractual language in the absence of any ambiguity in that language. (See *Gil v. Mansano, supra,* 121 Cal.App.4th at p.743.) In the absence of extrinsic evidence to interpret the attorney fee provision of a contract, "the appellate court determines de novo whether the contractual attorney fee provision entitles the prevailing party to attorney fees." (*Ibid.*)

Here, the pertinent language of the fee provision provides: "In the event of any controversy, claim, or dispute *relating to this instrument or the breach thereof, . . .* the prevailing party shall be entitled to recover [attorney's fees] from the losing party." The plain language of the fee provision authorizes attorney fees to the prevailing party in the event of "any controversy, claim, or dispute"; however, the controversy, claim or dispute must be one "relating to this instrument or the breach thereof." Patently, Oncology's prescriptive easement claim does not relate to the 1985 grant of easement. Accordingly, we conclude MTI is not entitled to attorney fees under the fee agreement because it prevailed on Oncology's prescriptive easement claim. Moreover, because Oncology prevailed on its claims to enforce the 1985 easement grant, we conclude the trial court did not abuse its discretion in determining that Oncology was the prevailing party under section 1717.

Last, we address MTI's contention that it was entitled to attorney fees under section 1032 because it prevailed on the majority of the litigation. In support of its contention MTI relies upon the trial court's fee award wherein the trial court awarded Oncology only 35 percent of its fee request and denied 65 percent of Oncology's fee petition relating to the prescriptive easement issue. This contention is baseless. The trial court awarded fees to Oncology for work related to its claims on the contract—the 1985 grant of easement—pursuant to sections 1717 and 1032. As noted above, the prescriptive easement is not covered under the contract so it is simply irrelevant to our analysis of the

court's fee award. MTI suggests the trial court's exercise of its discretion in this regard amounted to a miscarriage of justice. (See *Silver v. Boatwright Home Inspection, supra*, 97 Cal.App.4th at p. 449 [award of attorney fees under section 1032 is reviewed for abuse of discretion, which appears when the trial "court exceeds the bounds of reason . . . and unless there has been a miscarriage of justice"].) Here the trial court only awarded Oncology attorney fees for claims *relating to* the 1985 grant of easement. Thus, the trial court's ruling was well within the bounds of reason and was not a miscarriage of justice.

In sum, the trial court's attorney fee award in favor of Oncology as the prevailing party under sections 1717 and 1032 is affirmed.

C. Prescriptive Easement Providing for 30 Parking Spaces (Phase I)

In A129773, Oncology cross-appeals the trial court's Phase I ruling denying its claim for a prescriptive easement to 30 parking spaces on the HPC lot. We find for the reasons stated below that the record before us supports the trial court's rejection of Oncology's claim.

1. Applicable Legal Standards

A party seeking to prove a prescriptive easement must show actual use of the servient property that is open and notorious, hostile and adverse to the owner's interest in the land, continuous and uninterrupted for at least five years, and used under a claim of right. (See *Otay Water Dist. v. Beckwith* (1991) 1 Cal.App.4th 1041, 1045; *Felgenhauer v. Soni* (2004) 121 Cal.App.4th 445, 449 (*Felgenhauer*).) The burden of proof with respect to each of the elements required to establish a prescriptive easement is upon the party asserting the claim. (*Twin Peaks Land Co. v. Briggs* (1982) 130 Cal.App.3d 587, 593.) Also, the party seeking to establish a prescriptive easement must satisfy the burden of proof by "clear and convincing evidence." (*Applegate v. Ota* (1983) 146 Cal.App.3d 702, 708 (*Applegate*).)

Whether the party can prove all the elements of a prescriptive easement is a factual question, which we evaluate on appeal using the substantial evidence standard. (See *Felgenhauer, supra,* 121 Cal.App.4th at p. 449.) We will affirm the trial court's

judgment if any substantial evidence supports the decision. (*Applegate, supra,* 146 Cal.App.3d at p. 708.) Evidence is substantial if "it is of 'ponderable legal significance,' 'reasonable in nature, credible, and of solid value.' [Citations.]" (*Brewer v. Murphy* (2008) 161 Cal.App.4th 928, 935-936.) We consider evidence supporting the prevailing party only, and discard any unfavorable evidence. (*Felgenhauer, supra,* 121 Cal.App.4th at p. 449.) If the trial court draws a reasonable inference, we cannot draw a different one. (*Ibid.*) A trier of fact's in-person view of the land in question "is independent evidence which can be considered by him in arriving at his conclusion, and is substantial evidence in support of findings consonant therewith. [Citations]." (*Applegate, supra,* 146 Cal.App.3d at p. 712.)

2. Analysis

Preliminarily, we dispose of Oncology's assertion that we should review the trial court's prescriptive easement ruling de novo because the trial court applied the wrong legal standard in determining whether Oncology's alleged prescriptive use was open and notorious. Specifically, Oncology draws our attention to the SOD and highlights that portion of the decision in which the trial court found the manner in which Oncology used the HPC parking lot did not provide defendants with "*constructive notice*" of ongoing prescriptive use. Oncology contends this was error because the court failed to address whether that defendants had *actual notice* of its open and notorious use, as demonstrated by the testimony of Robert Paul, the onsite property manager for Cheng and MTI. Thus, Oncology argues the trial court's failure to determine whether defendants had actual notice of its open and notorious use constitutes an error of law necessitating de novo review. We disagree. As we stated in *Muzquiz v. City of Emeryville* (2000) 79 Cal.App.4th 1106 (*Muzquiz*); "A statement of decision need not address all the legal and factual issues raised by the parties. Instead, it need do no more than state the grounds upon which the judgment rests, without necessarily specifying the particular evidence considered by the trial court in reaching its decision. [Citations.] '[A] trial court rendering a statement of decision . . . is required to state only ultimate rather than evidentiary facts because findings of ultimate facts necessarily include findings on all intermediate

evidentiary facts necessary to sustain them. [Citation.] [Citations.]' " (*Id.* at pp. 1124-1125.)

Here, the court determined the ultimate fact that Oncology's use of the HPC parking lot was not open and obvious. In determining that ultimate fact, the court necessarily found that the owner of the HPC lot had neither actual nor constructive notice of the alleged prescriptive use. (See *Applegate, supra,* 146 Cal.App.3d at p. 709 [stating that "visible, open and notorious use implies that the owner had either actual or constructive notice"].) Accordingly, we turn to address Oncology's contention that the trial court's denial of Oncology's prescriptive easement claim is not supported by substantial evidence. (See *Felgenhauer, supra,* 121 Cal.App.4th at p. 449 [whether party can establish claim of a prescriptive easement is a factual question appellate court reviews for substantial evidence].)

Oncology principally relies on the testimony of Robert Paul in support of its assertion of error. In pertinent part, Paul testified that from 1996 to 2005 he was employed as Building Manager at the HPC by both Cheng and MTI. During the time Cheng owned HPC, Paul worked on site and reported directly to Cheng. Cheng did not have an office at the HPC and he visited the property only once or twice a month. Throughout Paul's tenure as building manager, the HPC parking lot was used "by people from the cancer center." Paul knew these people were from the cancer center because he observed them "coming into the parking lot and getting out and going into the cancer center." This use was not "confined to any particular spaces" but involved "a large number of spaces" that were "generally down close to their parking lot and to the building." Paul testified that this pattern of use by the cancer center patrons occurred on a daily basis until the summer of 2001, when discussions began with "people at the cancer clinic about the parking lot usage."

Based upon Paul's testimony, Oncology contends that by summer 2001, it had established a prescriptive easement for 30 spaces in the HPC parking lot given its "open and notorious" use. We reject this contention because the record supports the trial court's

conclusion that Oncology failed to show its alleged prescriptive use of 30 parking spaces in the HPC parking lot was open and notorious.

We reiterate that to establish a prescriptive easement the use must be sufficiently visible, open and notorious so that anyone viewing the servient tenement would discover the easement. Or, as one court colorfully stated it, the adverse user " 'must unfurl his flag on the land, and keep it flying, so that the owner may see, if he will, that an enemy has invaded his domains, and planted the standard of conquest.' " (*Myran v. Smith* (1931) 117 Cal.App. 355, 362.) Consistent with the trial court's rejection of Oncology's claim, Cheng testified that when his company purchased the HPC property he reviewed the title report and understood it reflected easements in favor of Oncology. These easements permitted some parking by Oncology on the HPC lot; however, there were more than 20 other tenants in the HPC building who could lawfully park in the lot. When the dispute between Cheng and Oncology over the use of parking space arose in 2001, Paul and other employees actually began to monitor parking at the HPC lot each day, for a short time in the morning and again in the afternoon. Paul opined "cancer center cars" occupied "probably [between] ten or twelve spaces" in the HPC parking lot in the morning and less in the afternoon. This parking was not "confined to any particular space" but the cars "were all down closer to the cancer center. [¶] . . . [¶] . . . [in] any of the spaces . . . around the back side of their building." However, Paul also testified that authorized users of the parking lot carried no placard or sticker that distinguished them from unauthorized users. Dr. Fuery, Oncology's owner, also testified cars parked by patients going to the Oncology building were indistinguishable from other cars in the lot. Indeed, Dr. Fuery confessed to such undetectable and unauthorized use of the HPC parking lot on his part when he testified that after he stopped treating patients in 1998 he continued to visit a favorite restaurant near the Oncology building, and when he did so he parked in the HPC parking lot. Christina Linn, who worked at Oncology from 1989 until 1997, testified that Oncology employees parked "in the back lot" [HPC parking lot] and patients used "the front lot" [Oncology building parking]. Patients sometimes used the back lot if the front lot was full because occasionally Linn assisted a patient to a car parked there. Brian

Fuery, Dr. John Fuery's son, was Business Manager for Oncology from 1986 to 1998; he testified that Oncology's parking needs fluctuated according to patient load.

This evidence, and the inferences to be drawn from it, supports the court's finding that "multiple tenants and users have parking rights with no specific pattern of coming and going, arriving and leaving at all times during the day. [Oncology] produced no clear and convincing evidence that the nature of [its] . . . use was sufficiently unique" to be open and notorious. Stated otherwise, substantial record evidence supports the conclusion that Oncology failed to show open and notorious use of an area within the HPC parking lot, defined by particular spaces or the metes and bounds of a specific location, sufficient to establish a prescriptive parking easement distinguishable from, and in addition to, the parking permitted under the 1985 parking easement. (Cf. *Warsaw v. Chicago Metallic Ceilings, Inc*. (1984) 35 Cal.3d 564, 571 [existence of a prescriptive easement must be shown by a definite and certain line of travel for the statutory period]; *Dooling v. Dabel* (1947) 82 Cal.App.2d 417, 424 ["The mere traveling over land of an owner in various courses and directions for a period of five years will not suffice to establish prescriptive title to an easement in a roadway"].)[6]

D. Motion to Amend Cross-Complaint (Phase II)

In A130132, MTI first contends that the trial erred when it denied MTI's oral motion to amend its cross-complaint to conform to proof during Phase II of trial proceedings. We find no error on this point.

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[6] Indeed, to the extent Oncology asserts its employees and customers parked wherever they wanted in the lower end of the HPC parking lot, well in excess of the six spaces specified in the 1985 parking easement, they undermine their claim of a prescriptive easement. "Where an incorporeal interest in the use of land becomes so comprehensive as to supply the equivalent of ownership, and conveys an unlimited use of real property, it constitutes an estate, not an easement." (*Mehdizadeh v. Mincer* (1996) 46 Cal.App.4th 1296, 1306, citing *Raab v. Casper* (1975) 51 Cal.App.3d 866, 876-877.) The granting of an estate in real property requires proof of adverse possession, including the payment of taxes (see *Raab v. Casper*, *supra*, 51 Cal.App.3d at p. 877), which was not established here.

1. Background

MTI filed its cross-complaint in February 2007. In the cross-complaint, MTI alleges it purchased the HPC property from Cheng pursuant to a purchase agreement containing an express warranty that "to the best of [Cheng's] actual knowledge" the Property is free and clear of all unrecorded easements, and a promise to indemnify the purchaser (MTI) for any loss or claim for damages arising from a breach of the express warranty, including attorney fees. MTI's first cause of action for breach of the purchase agreement alleges Cheng failed "to inform MTI [] of the existence of the Alleged Prescriptive Easement" for 30 parking spaces in the HPC lot asserted by Oncology in its complaint to quiet title against Cheng and MTI. The second cause of action asserts a claim for intentional misrepresentation and alleges "the Alleged Prescriptive Easement was not one of the permitted exceptions of which MTI [] approved, and MTI [] was unaware of the Alleged Prescriptive Easement when it purchased the property." The cross-complaint also asserts causes of action for negligent misrepresentation and suppression of fact, based on allegations that Cheng knew, or should have known about the Alleged Prescriptive Easement claim and failed to disclose existence of the Alleged Prescriptive easement to MTI.

MTI orally moved to amend its cross-complaint when Cheng's counsel moved for a directed verdict at the close of MTI's case-in-chief in Phase II of the trial proceedings. Cheng argued it was entitled to a directed verdict because the causes of action in MTI's cross-complaint were founded upon Cheng's alleged failure to notify MTI about Oncology's prescriptive easement claim and MTI failed to present evidence showing Cheng had actual knowledge of this claim at the time the HPC property was sold to MTI. In response, counsel for MTI stated: "To the extent the Court finds there are inconsistencies between the pleading and the proof, your Honor, I would request leave to amend the cross-complaint to conform to proof." Specifically, MTI's counsel asked to amend the cross-complaint to allege that at the time the HPC property was sold to MTI Cheng knew Oncology disputed the location of the 1985 parking easement but he did not impart that information to MTI. The court ruled on MTI's motion to amend as follows:

"There is a request of the cross-complainant to amend the cross-complaint. That motion is denied. This case has been pending a substantial amount of time. The cross-complaint was filed on February 21, 2007. We've already gone through a phase of this trial, a very long substantial phase including proposed statements of decision, objections to those statements of decision. The motion to amend the cross-complaint is denied."

2. Analysis

The ruling of a trial court denying leave to amend will not be disturbed on appeal, absent a showing by the appellant of a clear abuse of discretion. (*Marvin v. Marvin* (1976) 18 Cal.3d 660, 667, fn. 2.) A motion to amend need not be granted when the proposed amendment is presented belatedly without good explanation or would be futile. (See *City of Stanton v. Cox* (1989) 207 Cal.App.3d 1557, 1563-1564 (*Cox*); accord, *Levy v. Skywalker Sound* (2003) 108 Cal.App.4th 753, 770-771 (*Levy*) and *Vaillette v. Fireman's Fund Ins. Co.* (1993) 18 Cal.App.4th 680, 685.) Also, a motion to amend may be denied in those instances in which prejudice would result to the opposing party. (See *Union Bank v. Wendland* (1976) 54 Cal.App.3d 393, 400 (*Union Bank*).) In ruling on a motion to amend, "trial courts should be guided by two general principles: (1) whether facts or legal theories are being changed and (2) whether the opposing party will be prejudiced by the proposed amendment. Frequently, each principle represents a different side of the same coin: If new facts are being alleged, prejudice may easily result because of the inability of the other party to investigate the validity of the factual allegations while engaged in trial or to call rebuttal witnesses. If the same set of facts supports merely a different theory . . . no prejudice can result." (*Cox, supra*, 207 Cal.App.3d at p. 1563.)

Here, MTI knew of the factual basis for its proposed amendment relating to Cheng's failure to apprise it of the dispute over the location of the 1985 parking easement well before trial commenced. For example, Oncology's complaint, filed in 2007, alleges the 1985 parking easement was for six undesignated parking spaces on HPC property adjacent to the property line. The complaint further alleges that the barriers installed by Cheng not only obstructed Oncology's use of its alleged prescriptive easement, but also

obstructed full use of "the two easements created by the Grant of Easement." Oncology's complaint also alleges the proper location of the 1985 parking easement. Thus by January 2007, the location of the parking easement was clearly at issue and was hotly contested throughout Phase I trial proceedings in June 2009. Nevertheless, MTI did not move to amend its cross-complaint until it concluded its case in Phase II of trial proceedings in February 2010. MTI offers no satisfactory explanation why it waited until close of its case-in-chief to allege a new factual basis for the causes of action stated in the cross-complaint. For this reason alone, the court did not abuse its discretion by denying the motion to amend. (Cf. *Union Bank, supra,* 54 Cal.App.3d at p. 400.)

As importantly, MTI's proposed amendment would have introduced new issues for trial, which Cheng could not fairly defend against without prolonging the proceedings by allowing for further discovery. In this regard, the situation here is analogous to *Trafton v. Youngblood* (1968) 69 Cal.2d 17. In *Trafton*, the plaintiff sued his attorney for diversion of escrow funds, and the attorney cross-complained for fees on an account stated. (*Id.* at pp. 21-22.) Following trial, the attorney sought to amend the cross-complaint to conform to proof on a claim of quantum meruit. (*Id.* at pp. 23-24.) In affirming the trial court's refusal to allow the attorney to amend his pleading, the California Supreme Court held that the "amendments of pleadings to conform to the proofs should not be allowed when they raise new issues not included in the original pleadings and upon which the adverse party had no opportunity to defend. [Citations.]" (*Id.* at p. 31.) Here, nothing in MTI's cross-complaint informed Cheng that MTI sought to impose liability on the grounds that, at the time of the sale in question, Cheng had actual knowledge the 1985 parking easement was located behind the Oncology building and misrepresented or suppressed that fact. MTI's proposed amendment, raising the new issue of whether Cheng knew at the time of the sale in question that the 1985 parking easement was located at the rear of the Oncology building, completely changed the factual predicate for the causes of action alleged in the cross-complaint and would have necessitated additional discovery on extrinsic evidence necessary to determine whether the indemnification clause applied to representations regarding the location of the parking

easement and whether the recorded parking easement fell within the permitted exceptions referenced in the purchase agreement. Under these circumstances, the proposed amendment prejudiced Cheng.

In sum, MTI fails to provide any reasonable explanation for its inexcusable delay in seeking to amend its cross-complaint, and the record establishes that the proposed amendment would have prejudiced Cheng or further delayed the proceedings. Thus, we conclude that the trial court's denial of the motion to amend was not an abuse of discretion.

E. Statement of Decision (Phase II)

In A130132, MTI also challenges the trial court's findings and conclusion in the SOD (Phase II) that MTI take nothing by its cross-complaint. On appeal, we review findings of fact made by trial court in its statement of decision rendered after a nonjury trial under the substantial evidence standard. (See *SFPP v. Burlington Northern & Santa Fe Ry. Co.* (2004) 121 Cal.App.4th 452, 461-462.) Under this standard, we "view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor in accordance with the standard of review so long adhered to by this court." (*Jessup Farms v. Baldwin* (1983) 33 Cal.3d 639, 660.)

MTI contends the trial court erred in rejecting its breach of contract claim by finding Cheng did not have actual knowledge of the alleged prescriptive easement at the time of the sale in question. Specifically, MTI asserts that evidence concerning the 2001 dispute between Cheng and Oncology compels a finding Cheng had actual knowledge of Oncology's prescriptive easement claim. We disagree.

The 2001 dispute over the location of the parking stall easement arose after the HPC parking lot suffered damage caused by water draining from the roof of the Oncology building and by heavy equipment that Oncology's tenant placed on the lot. In an effort to resolve the dispute, in the fall of 2001 Cheng erected temporary posts and chains to close off access to the HPC lot from the Property. This action sparked a series of correspondence between Clarence Moy, Cheng's attorney, and Stephen Kass,

Oncology's attorney, after Kass asserted the grant of easement. In a letter from Moy to Kass dated September 10, 2001, Moy states the temporary posts and chains had been removed and asks Kass to send him a copy of the grant of easement. On October 9, 2001, Moy advised Kass he had reviewed the grant of easement and had determined the access easement was designated by an area of 1906 square feet highlighted on an accompanying diagram and "suggest[ed] that it is within this same area that the six parking spaces would be located." Moy also asked Kass to "immediately notify your client that its use of my client's property outside of the designated area, for parking, passage, or for any other purpose, is prohibited."

Subsequently, Kass wrote to On Cure Technologies, Oncology's tenant at that time, stating, "[A]pparently you have been allowing your personnel and guests to enter and/or exit across the parking lot owned by Mr. Cheng contrary to the rights of the owner. Although it is not clear what area is operated by the Lease, you should immediately advise any and all personnel and guests that they must use the access and egress area granted by Landlord's easement only and not trespass upon the remainder of the parking lot owned by Mr. Cheng. Mr. Cheng has marked the access and egress area in white. Failure to abide by this requirement shall be grounds for breach of the lease and immediate termination." Dr. Fuery met Robert Paul on site to discuss the dispute and Fuery told Paul he would "take care of" the problem, meaning he would put a stop to excess parking on the HPC lot. Kass wrote to Moy again in December 2001, stating, "We are doing all in our power to resolve all your client's complaints."

After Cheng installed permanent barriers in January 2002, Kass wrote to Moy stating he had observed the barriers and disagreed with Moy's interpretation of the easements. Kass opined the parking easement was "separate and apart from the access easement" and that "there is only one area" that would allow six cars to park adjacent to the property line without interfering with the access easement, namely, "[t]hat area adjacent to the property line behind the [Oncology] building." Kass asserted that Oncology's use of the HPC parking lot as an exit point had ripened into "an access prescriptive easement," and demanded access to the area behind the Oncology building

for parking purposes. In response, Moy wrote to Kass in February 2002 drawing Kass' attention to the arbitration clause in the grant of easement and stated, "If you believe that the location of the six parking spaces is not in compliance with the language of the easements, I would suggest that the easement requires arbitration and you are invited to initiate same."

Kass testified in Phase I that he took no action in response to Moy's February 2002 letter. Kass thought the matter had been settled because after the letters from Moy, "Dr. Fuery had no further contact with me about this issue" and "I had no further dealings with it." During phase II, Cheng testified that Moy told him Oncology did not respond to Moy's last letter so the matter was over; Cheng assumed "everything was settled."

It is clear from the evidence that Cheng knew a dispute occurred in 2001 concerning the scope of the easements under the 1985 grant; however, it demonstrably fails to establish Cheng was on notice Oncology claimed a prescriptive parking easement to 30 spaces in the HPC lot.[7] On the contrary, substantial evidence supports the trial court's finding that Cheng lacked actual knowledge of Oncology's claim to a prescriptive easement over 30 parking spaces.[8]

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[7] There is a lone vague reference to a prescriptive easement found in Kass's January 2002 letter to Moy wherein he indicates that Oncology's use of the exit to the HPC lot had ripened into "*an access* prescriptive easement" in connection with his demand for access to the parking area behind the Oncology building.

[8] Despite the trial court's denial of the motion to amend the pleadings, MTI argues at length on appeal that Cheng is liable on account of his actual knowledge, not of the alleged prescriptive easement claim, but of the 2001 dispute, imputed through Robert Paul, and Cheng's failure to disclose the same. Even if this argument was proper, it would fail because the record contains substantial evidence that Cheng disclosed the history of the easement dispute to MTI prior to the sale of the HPC property. For example, Cheng testified that following the 2001 dispute he decided to put up the posts "based on what we understood [to be] the location" of the 1985 easements and mark off the area for Oncology's use. Cheng explained the reason for the posts to John Crockett, his real estate agent in marketing the HPC property, and Crocket saw the posts and talked to Cheng's employees at HPC about them. Cheng instructed Crocket to inform the buyer why posts were placed in that location. Crockett testified that before the sale he attended a site inspection along with Michael Nakamura, Tomo Fukomoto, and Robert Paul. During the inspection, they saw the posts and Nakamura wanted to know the details

Furthermore, MTI contends the trial court's SOD erroneously denied its indemnification claim. Specifically, MTI contends it was entitled to indemnification as a matter of law because the indemnity provision covered the claims in Phase I and Phase II. However, given our affirmance of the trial court's determination that Cheng did not have knowledge of Oncology's prescriptive easement claim, MTI's contention that the trial court erred in failing to find a violation of the express warranty provision necessarily fails.

F. Appeal No. A132061

Appeal number A132061 arises from MTI's notice of appeal challenging the trial court's post-judgment award to attorney fees to Cheng as the prevailing party in Phase II of the trial proceedings. The trial court filed its order on attorney fees on May 10, 2011, awarding Cheng reasonable attorney fees in the amount of $46,400.23. MTI filed a notice of appeal regarding trial court's post-judgment fee order on May 20, 2011. However, in its joint briefing of appeal numbers A130132 and A132061, MTI offers no argument on the issue of attorney fees. Contentions unsupported by either argument or authority are deemed abandoned. (*San Mateo County Coastal Landowners' Assn. v. County of San Mateo* (1995) 38 Cal.App.4th 523, 559; *Downey Savings & Loan Assn. v. Ohio Casualty Ins. Co.* (1987) 189 Cal.App.3d 1072, 1090.) Because MTI has not shown any abuse of discretion by the trial court in awarding attorney fees to Cheng as the prevailing party on Phase II, the fee award must stand undisturbed.

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about Oncology's easement. Crockett asked Robert Paul to explain the reasons for the posts. Paul told Nakamura that Oncology had been parking beyond the easement and the posts were intended to confine Oncology to the number of parking spaces granted in the easement. Also, Crockett told Nakamura he could verify the location of the easements by consulting a surveyor or seeking the advice of an attorney. True, the evidence was in conflict on this point. For example, in one portion's of Paul's deposition testimony read during Phase II, Paul states he never said, "[Y]es, there's an easement problem or something like that. I never would have done that, so I know I didn't say anything about it." Nevertheless, the court did not make an adverse credibility determination as to any of the witnesses in Phase II, so in accord with the applicable standard of review, we must resolve the conflict in favor of the judgment. (See *Jessup Farms v. Baldwin, supra,* 33 Cal.3d at p. 660.)

DISPOSITION

In A128351, the trial court's Phase I judgment, granting Oncology injunctive relief and fixing the location of six parking spaces granted under the 1985 grant of easement, is affirmed. In A129773, we affirm the trial court's ruling in Phase I denying Oncology's prescriptive easement claim. In A130132, we affirm the trial court's Phase II judgment in all respects. In A132061, we affirm the trial court's post-judgment order awarding Cheng attorney fees for Phase II proceedings. In appeal numbers A128351 and A129773, each party shall bear its own costs on appeal. In appeal numbers A130132 and A132061, appellant Series I of MTI Properties, LLC shall bear costs on appeal.

_____
Jenkins, J.

We concur:

_____
McGuiness, P. J.

_____
Pollak, J.

APPENDIX

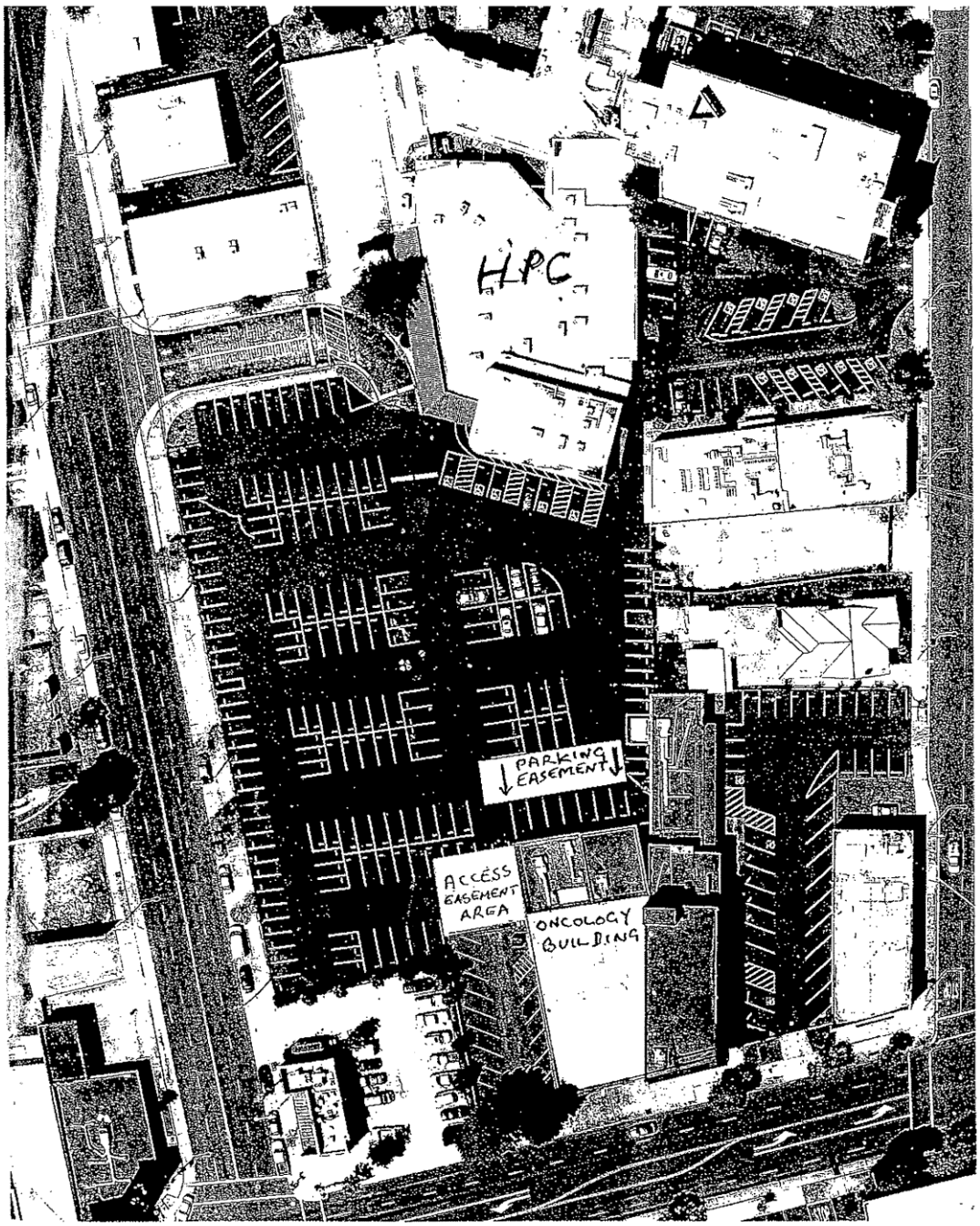
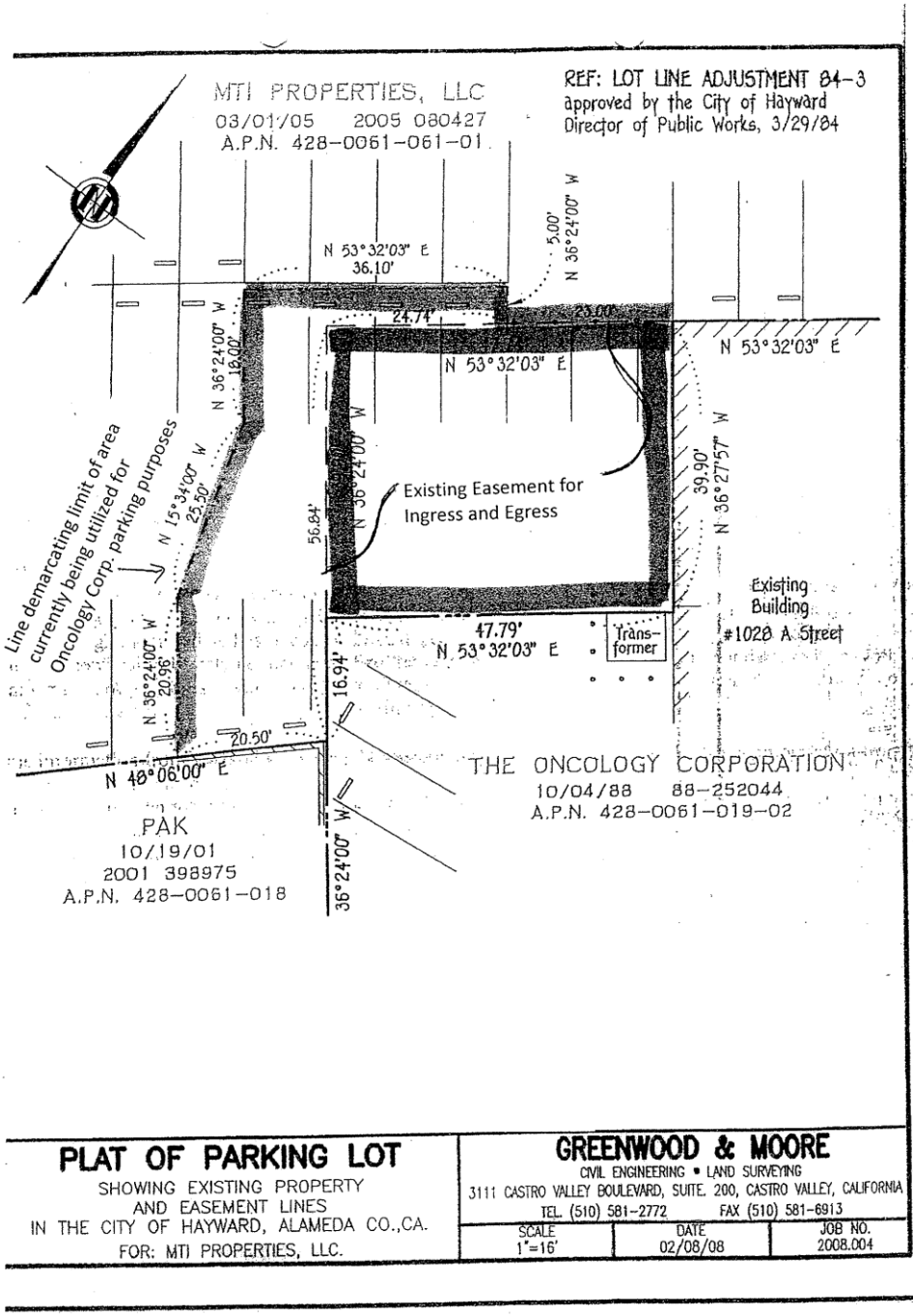


DIAGRAM 1


MTI PROPERTIES, LLC
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REF: LOT LINE ADJUSTMENT 84-3
approved by the City of Hayward
Director of Public Works, 3/29/84
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36.10'
5.00'
N 36°24'00" W
24.74'
N 53°32'03" E
N 36°24'00" W
18.00'
N 53°32'03" E
N 36°24'00" W
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Existing Easement for
Ingress and Egress
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Line demarcating limit of area
currently being utilized for
Oncology Corp. parking purposes
N 15°34'00" W
25.50'
Existing
Building
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N 53°32'03" E
Trans-
former
N 36°24'00" W
20.98'
16.94'
20.50'
N 48°06'00" E
THE ONCOLOGY CORPORATION
10/04/88 88-252044
A.P.N. 428-0061-019-02
PAK
10/19/01
2001 398975
A.P.N. 428-0061-018
36°24'00" W
PLAT OF PARKING LOT
SHOWING EXISTING PROPERTY
AND EASEMENT LINES
IN THE CITY OF HAYWARD, ALAMEDA CO.,CA.
FOR: MTI PROPERTIES, LLC.
GREENWOOD & MOORE
CIVIL ENGINEERING • LAND SURVEYING
3111 CASTRO VALLEY BOULEVARD, SUITE. 200, CASTRO VALLEY, CALIFORNIA
TEL. (510) 581-2772 FAX (510) 581-6913
SCALE
1"=16'
DATE
02/08/08
JOB NO.
2008.004

DIAGRAM 2